

Date Signed: July 13, 1979

MEMORANDUM

SUBJECT: WSG-64 Guidance for the Issuance of
Variances* and Exemptions

FROM: Victor J. Kimm, Deputy Assistant Administrator
(signed by Victor J. Kimm)
Office of Drinking Water (WH-550)

TO: Regional Water Supply Representatives I-X

Attached is the subject guidance document which is to be used as the Office of Drinking Water's policy on all aspects of variances and exemptions. A draft was previously circulated to the Regions, States, and the National Drinking Water Advisory Council for their review and comment. This guidance replaces the previous correspondence on the subject - e.g., Water Supply Guidance (WSG) - 28, 28-1, 28-2. The guidance on the Regional review of State issued variances and exemptions, WSG-55, remains in effect and should be used in conjunction with this guidance.

It is requested that you share this document with the States in your Region so that they will be aware of the policy and procedures outlined in the guidance. A thorough understanding of the basis of our policy (Preface and Section I) by the States will clarify many of the constraints imposed by the Safe Drinking Water Act and should minimize unnecessary confusion at the State level.

The guidance is divided into five inter-related sections: (1) conditions for granting; (2) economic criteria; (3) toxicology; (4) procedures; and (5) compliance agreements. Questions regarding toxicology should be referred to Joe Cotruvo; Craig Vogt is the contact for treatment technology, and issues regarding procedures and economics should be addressed to Jim Manwaring.¹

***Note: Needs to be updated to reflect V&E rule.**

¹ NOTE: This is current guidance on variances and exemptions and should be retained until it is superseded. Please note that the 1986 Amendments require a compliance schedule at the time of granting the variance or exemption. (Not within one year.) The 1986 Amendments also changed the deadlines for exemptions. See SDWA Sections 1415 and 1416.

Utilization of Variances and Exemptions

We recognize that there are non-compliance situations where a few of the States have felt that the issuance of a variance was the only viable alternative available to them. These situations have included new systems, systems where the construction necessary to achieve compliance would extend past the 1981 exemption deadline, cases where the applicable treatment would be extremely expensive for the small utility, etc. While we are sensitive to these issues, we are constrained by the statutory provisions of the Safe Drinking Water Act. In this respect, I have attached two additional documents for your review and reference - please insure that the States receive copies of these also.

The first document is the legal interpretation by the Office of General Counsel regarding the granting of variances and exemptions. The second is a copy of the relevant pages of a recent House Committee Report on the issue of variance utilization. (See footnote on page 3 of the report). Both of the documents clearly indicate that variances are to be restricted to only those systems which have installed the appropriate treatment technology and are still unable to comply with the maximum contaminant level.

In addition to this legal mandate, there are important programmatic reasons why we do not wish to open up the eligibility for variances. If systems could obtain variances on the grounds that compliance was not feasible for their particular system without first installing appropriate treatment technology, the constraints imposed by exemptions would be nullified. This could lead systems that did not want to comply to argue economic unfeasibility to delay improvements in drinking water quality for significant periods of time.

With respect to the statutory deadline for exemptions -- January 1, 1981 for systems not joining regional systems, we intend to again discuss the problem with the Congress during oversight hearings this fall. The heart of the problem is the statutory directive to set standards taking into account the cost of treatment for large systems. Since there are economies of scale in water treatment, this means that some small systems cannot afford to add treatment without some type of subsidy. When the Safe Drinking Water Act was passed in 1974, Congress recognized this problem and indicated that later action might be necessary. EPA expects that these problems will be addressed by the Congress in the fall.

During the hearings early this year, EPA proposed that the deadline for exemptions be made available to new systems where no alternative source exists and that the 1981 deadline for compliance be extended. The crowded Congressional agendas and the concern of some members that we could not quantify the magnitude of the problem--that is how many systems truly could not comply without assistance rather than those systems that choose not to comply--led to the decision to put forth a straight extension of authorities now, and consider substantive issues during oversight hearings this fall. Prior to these hearings we will work with you and the States to better define the national situation.

Actions Required

With respect to the variance and exemption issue, there are two sets of problems we face. The first relates to avoiding the issuance of any new variances and/or exemptions which are not in conformance with the law.

The second is attempting to correct any variances and/or exemptions which have been incorrectly or illegally issued in the past. Therefore, I am requiring that the following set of actions be taken by the Regional Offices:

1. Immediately disseminate the attached Guidance, OGC legal opinion, and House Committee Report to the States. These documents clearly define our position on the issues.
2. By August 15, provide us (Jim Manwaring) with a quick survey of State-issued variances and exemptions. The information should include:
 - a. Number and type (contaminant) of V&Es issued;
 - b. Size of systems;
 - c. Compliance deadline established if schedules have been issued;
 - d. Whether the system was in operation on June 24, 1977; and
 - e. Where feasible, identify the specific system which the State believes cannot be in compliance by January 1, 1981.

This information will be critical to us in developing our testimony for Congress.

3. Inform the States that any inappropriately issued variances must be repealed (and exemptions, compliance orders, etc. issued in place of a variance) as soon as possible. By October 15, 1979, we expect the States to have made the necessary changes or to have begun administrative procedures to do so.
4. Complete a comprehensive review of all FY 1979 State-Issued V&Es by January 1, 1980, (following WSG-55) and submit the reports to ODW (Jim Manwaring) by February 1, 1980. The basis for this review is the fact that many of the inorganic problems were not detected during FY 1978 due to the phasing of monitoring requirements in the regulations and thus, were not covered by the January 1979 review. The authority for this review is in Sections 1415(a)(1)(F) and 1416(d) of the Act and Section 146.22 of the Implementation Regulations.

The States should also understand that we do not intend to allow any inappropriate variances to remain in effect. One alternative would be for EPA to request a declaratory judgment from a Federal court that all such variances previously issued be invalid. Another alternative available to us would be to initiate the revocation procedures related to variances and exemptions associated with abuse of discretion in the Implementation Regulations, Part C, Sections 142.20 to 142.24. This could lead to EPA-dictated changes in variances or exemptions and related compliance schedules without necessarily revoking State primacy. These alternatives are now being fully investigated and EPA will take action by the end of the year where illegal variances remain in effect. Hopefully, we will be able to work out these problems with the impacted States in a cooperative fashion without the need for formal action.

It is our position that for non-compliance systems that are acting expeditiously and in good faith to meet existing MCLs, States should issue exemptions to provide the systems more time to comply as long as the situation does not pose an unreasonable risk to public health. Compliance schedules must be issued within one year of issuance and must require compliance by the statutory deadlines. (NOTE: 1986 SDWA Amendments require compliance schedule at the time the variance or exemption is issued.) In the case of new systems or systems that in good faith cannot achieve compliance by the statutory deadlines, States may exercise their enforcement discretion to ensure compliance as expeditiously as practicable.

In conclusion, by whatever mechanisms available, EPA and the States should require as an initial action that non-compliant systems undertake engineering studies to determine the best means for compliance, and in cases where regionalization, alternative raw water sources, or blending are available, they may be cheaper and preferable to additional treatment for achieving compliance. Such efforts are critical in separating those systems that truly cannot comply without subsidy, from those who will not comply. The former may require assistance in working with the Farmers Home Administration (FHA) or the Small Business Administration (SBA) in order to come into compliance while the latter may require appropriate enforcement actions.

Your cooperation in the above actions is appreciated, and we feel that their implementation will ensure nationally consistent application of the variance and exemption process. One copy of the Guidance is attached for your use and reference. We are in the process of printing the entire document for bulk shipment to the Region. We will forward 50 additional copies to you when they are available - in the interim, you may wish to forward pertinent sections of the guidance to the appropriate States.

* Some States use the term "variances" to refer to both variances and exemptions as distinguished by the Federal Act. For such States, it will be necessary to clarify which type of variance has been issued.